High Court of Ireland Decisions

Judgment

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[2017] IEHC 417

THE HIGH COURT

Record No. 2013/82 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ZBIGNIEW JAWORSKI

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 3rd day of April, 2017.

1. The surrender of the respondent is sought by Poland pursuant to a European arrest warrant ("EAW") dated 7th February, 2013, for the purpose of conducting a criminal prosecution in respect of two offences. Three contested issues arose during the course of the hearing. The first contested claim is that the EAW contravenes s. 11(1)(a) of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003") because one of the offences for which the respondent's surrender is sought, and the sentence to which he may be exposed thereon, is uncertain. The second claim is that he is at real risk of being subjected to inhuman and degrading treatment by virtue of the prison conditions in Poland. The final claim is that surrender would violate his right, under the Constitution

and under Article 8 of the European Convention on Human Rights ("ECHR"), to respect for his private and family life.

The European Arrest Warrant
2. The surrender provisions of the Act of 2003 apply to those member states of the European Union ("E.U.") that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the Council (EC) Framework Decision of 13th June, 2002, on the European Arrest Warrant and surrender procedures between Member States ("the 2002 Framework Decision"). I am satisfied that by the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004 (S.I. No. 206/2004), the Minister for Foreign Affairs has designated Poland as a member state for the purposes of the Act of 2003.

Uncontested issues

Identity
3. I am satisfied on the basis of the affidavit of Seán Fallon, member of An Garda Síochána, the affidavit of the respondent, and the details set out in the EAW, that the respondent, Zbigniew Jaworski, who appears before me, is the person in respect of whom the EAW has issued.

Endorsement
4. I am satisfied that the EAW has been endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction.

Sections 21A, 22, 23 and 24 of the Act of 2003
5. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse the respondent's surrender under the provisions of the Act of 2003, as amended.

Part 3 of the Act of 2003
6. Subject to further consideration of s. 37, s. 38 and s. 45 of the Act of 2003, as amended, and having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the said Act.

The Provisions of Section 38 of the Act of 2003
7. The respondent is sought for prosecution for two offences. The first offence is described in Polish law as a robbery. The accusation as set out in the EAW is of committing a robbery in such a way that after beating the person who suffered bodily injuries, "he took for appropriation the passenger car …". In those circumstances, the Court is satisfied that the facts alleged correspond with the offence of robbery in this jurisdiction. The facts also correspond with other offences such as assault contrary to s. 2 and s. 3 of the Non-Fatal Offences Against the Person Act, 1997.

8. The second offence accuses the respondent of, acting jointly and in concert with others "with a preconceived intent of gaining a material benefit," depriving a particular person of freedom and carrying him to "an undetermined place" and holding him for four days. During that period of time he is accused of acting "with a particular vexation consisting in beating all over the body, handcuffing, starvation and threat to deprive of life". The Court is satisfied that the facts alleged would amount, in this jurisdiction, to an offence of false imprisonment contrary to s. 15 of the Non-Fatal Offences Against the Person Act, 1997. The facts also correspond with other offences such as assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997.

9. The robbery offence carries a maximum length of custodial sentence of twelve years

deprivation of liberty, whereas the false imprisonment offence carries a maximum length of custodial sentence of fifteen years deprivation of liberty. In the circumstances, the requirement of minimum gravity has been met.

10. Therefore, the respondent's surrender is not prohibited under the provisions of s. 38 of the Act of 2003.

Section 45 of the Act of 2003

11. As he is sought for prosecution, the provisions of s. 45 of the Act of 2003, which deal with trial *in absentia* where there has been a request for surrender to serve a sentence imposed upon conviction, do not apply. The issuing judicial authority initially stated that the respondent did not appear personally at the trial in which the decree was rendered; this was clarified in later correspondence as a mistake. In any event, it is clear from Irish law that the provisions of point (d) in the EAW must only be completed where the person is sought to serve a custodial sentence or order of detention following conviction. Therefore, his surrender is not prohibited under the provisions of s. 45 of the Act of 2003.

Points of Objection

Section 11 of the Act of 2003

12. The respondent objected to his surrender on the basis that: "[t]he nature and legal classification of the alleged offence dated 6th January, 2005 is based on an offence not known to the laws of the Issuing State and in particular Article 189 § 3 of the Polish Penal Code is not an offence known to the laws of the Issuing State. In the circumstances, to seek the surrender of the Respondent fails to record what section 11 of the European Arrest Warrant Act, 2003 as amended and/or constitutes an abuse of process".

13. At point (e) of the EAW, with reference to the offence on 6th January, 2005, the offence of false imprisonment, the nature and legal classification of the offence is described as follows:-

> "deprivation of freedom associated with particular vexation and attempt of extortion committed in terms of special relapse - article 189, paragraph 3 in connection with article 13, paragraph 1, in connection with article 282 and article 11, paragraph 2 and in connection with article 64, paragraph 1 of the penal code."

14. The respondent sent a request to a Polish lawyer, Katarzyna Dabrowska, asking whether the offence from Article 189 § 3 of the Polish Penal Code was known to Polish law at the time of the commission of the alleged offences as set out in the European arrest warrant. Ms. Dabrowska has sworn an affidavit exhibiting a report in which she states that:-

> "Subject matter of the crime contained in the Article 189 of the Polish Criminal Code constitutes the offence against the legally protected good of liberty. The Article 189 (in reading at the time of alleged acts) stipulates that whoever deprives a person of liberty, is subject to the penalty of deprivation of liberty for between 3 months and 5 years. If the deprivation of liberty lasted longer than 7 days or was coupled with special torment, the perpetrator is subject to the penalty of deprivation of liberty for between one and 10 years. The crime can be only performed intentionally and is pursued by the public prosecution."

15. Ms. Dabrowska also stated that the legal classification in the part of the false imprisonment offence where it refers to Article 189, subs. 3 of the Polish Penal Code, is mistaken. Subsection 3 of the above mentioned article was added to the Polish Penal Code by the Act of 17th December, 2009 which reformed the Polish Penal Code on 19th

April, 2010. Therefore, at the time of the commission of the alleged actions, the offences currently stipulated in Article 189, subs. 3 of the Polish Penal Code did not exist. However, she says the element of "acting with special torment" was included in subs. 2 of the Article 189, which stipulated a lower threat of penalty.

16. The central authority sought further information about the statements of Ms. Dabrowska and asked the issuing judicial authority to:-

> "[…] please confirm whether the legal classifications of the crimes in the warrant are all correct. Please also confirm whether the offences in the warrant were offences at the time that they were committed."

17. The issuing judicial authority replied that:-

> "[…] [t]he allegation for the act which Zbigniew Jaworski is accused of in item 2 of the European Arrest Warrant was made in 2011, according to Article 189 of the Penal Code which has been in force since 19 April 2010.
>
> At the time of the commission of the act, *i.e.* in January 2005, Article 189 of the Penal Code read:
>
> Paragraph 1:
>
> > 'Whoever deprives a human being of their liberty shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years.'
>
> Paragraph 2:
>
> > 'If the deprivation of liberty exceeded longer than seven days, was coupled with special torment, the perpetrator shall be subject to the penalty of the deprivation of liberty for a term of between 1 and 10 years.'
>
> On 19 April 2010 the penal measure in Article 189 of the Penal Code with regard to the deprivation of liberty coupled with special torment was toughened. In the previous legislation both the deprivation of liberty which exceeded longer than seven days as well as the deprivation of liberty coupled with special torment were subject to the penalty for a term of between 1 and 10 years. After the introduction of the amendment, the perpetrator of the deprivation of liberty coupled with special torment was subject to the penalty of the deprivation of liberty for a term of not less than 3 years. This type of crime was stipulated in paragraph 3, as follows:
>
> > 'If the deprivation of liberty stipulated in paragraph 1 or 2 was coupled with special torment, the perpetrator shall be subject to the penalty of the deprivation of liberty for a term of not less than 3 years.'
>
> Paragraph 1 provides the following:
>
> > 'Whoever deprives a human being of their liberty shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years.'
>
> Paragraph 2:

> 'If the deprivation of liberty exceeded longer than seven days, the perpetrator shall be subject to the penalty of the deprivation of liberty for a term of between 1 and 10 years.'

In the light of the foregoing, the act which Zbigniew Jaworski was accused of in January, 2005, *i.e.* the deprivation of liberty which was coupled with special torment was certainly the crime at the time of its commission. As a result of the amendment to the provisions, the act was merely separated in paragraph 3 with a toughened penalty.

In a situation like the one above, it is essential to base on Article 4 paragraph 1 of the Penal Code which reads;

> 'If at the time of adjudication the law in force is other than that in force at the time of the commission of the offence, the new law shall be applied. However, the former law should be applied if it is more lenient to the perpetrator.'

In the above case, if the court, after having analysed the evidence, recognises that Zbigniew Jaworski is guilty of the commission of the offence stipulated in item 2 of the European Arrest Warrant, the court is required to apply the law which is more lenient to the perpetrator, *i.e.* the law in force at the time of the commission of the offence or at the time of adjudication. If the court assumes that the law in force at the time of the commission of the offence is more lenient, the court is obliged to sentence the accused on the basis of Article 189 paragraph 2 of the Penal Code according to Act of 6 June 1997, The Penal Code, which was in force until 18 April 2010 in connection with Article 4 paragraph 1 of the Penal Code.

Therefore, Zbigniew Jaworski's statement that at the time of the commission of the offence stipulated in item 2 of the European Arrest Warrant, the above offence did not exist is not true. The deprivation of liberty of a human being, especially coupled with special torment, constituted and still constitutes the offence under Article 189 of the Penal Code."

18. The argument that the respondent makes is a nuanced one. He has not sought to make the argument, quite understandably, that the offence for which he is sought is not a crime. It is a crime and was so at the time of its alleged commission. It should also be pointed out that the reference to the fifteen year sentence is explicable by the fact that this offence was allegedly committed in terms of special relapse. That permits the maximum sentence to be increased and in this case, there is no exception taken to the fact that the offence is taken to have a maximum sentence of fifteen years.

19. The point that counsel makes is that the EAW and the additional information is now unclear as to what in fact the respondent is being prosecuted for and to what sentence he may be subjected. Counsel questions if the respondent is being prosecuted in relation to subsections 2 or 3 of Article 189 of the Polish Penal Code.

20. It is quite understandable that the respondent had an initial concern about the reference to Article 189, subs. 3 of the Polish Penal Code. However, it has now been clarified in the letter of 19th December, 2016 that the respondent is accused of an offence contrary to Article 189 of the Penal Code. It is also perfectly clear that the Polish authorities are not proposing to impose a heavier penalty than that which was applicable at the time the criminal offence was committed. Indeed, that is prohibited by Polish law.

There is no suggestion of any breach of rights in this regard.

21. In the view of the Court, the letter of 19th December, 2016 has clarified that it is an offence under Article 189 that the respondent is being prosecuted for, *i.e.* deprivation of liberty. It is also stated that he is liable to the penalties that are set out therein, provided that the law which is more lenient to the perpetrator must be applied to him. Ultimately, it is a matter for the court in Poland to determine what he has actually committed, for example, whether he has deprived the person of liberty or whether he has deprived them of liberty with special torment. Depending on the finding, he will be subjected to a particular penalty. The court will then determine the more lenient law applicable. It appears that the new offence sets a mandatory minimum of three years but if the court does not consider that a sentence of three years is warranted, then the court will not be obliged to sentence him to a three year period, because it must apply the most lenient law.

22. This Court is firmly of the view that there is no uncertainty in the situation for this respondent. The alleged act was a crime at the time of its commission. If the respondent is adjudicated by the Polish court to have committed the act, the Polish court is bound to apply the law which is more lenient to him, *i.e.* the court must apply either the law at the time of the commission of the offence or at the time of the adjudication. Ultimately, only a Polish court can determine the precise facts that he has committed and whether the penalty will actually be more lenient.

23. In the particular circumstances, there is no uncertainty in a truly legal sense. The only "uncertainty" that exists is the uncertainty inherent in any properly functioning criminal justice system which makes a determination on sentence based upon the acts of which an accused has been found guilty and a consideration of the aggravating and mitigating circumstances which apply to the commission of that offence by that accused. That is not a situation which creates a legal or factual uncertainty which invalidates an EAW or prohibits surrender thereon.

24. Therefore, the Court rejects this point of objection and finds that the respondent's surrender is not prohibited by s. 11 of the Act of 2003.

Section 37 of the Act of 2003: Article 3 of the European Convention on Human Rights

25. The respondent claimed that he is at real risk of being subjected to inhuman and degrading treatment because of the conditions which obtain in Polish prisons and that his extradition is therefore prohibited. His point of objection referred to relevant provisions of the Charter of Fundamental Rights of the European Union, but as no particular reference was made to the Charter, this judgment will refer to the objection as being based upon Article 3 of the European Convention on Human Rights.

26. The respondent relied firstly on his own affidavit which describes his previous experiences in Poland. All of these pre-date 2005 when he apparently left Poland to go to the United Kingdom. His experiences are of very limited weight in the context of the period of time that has passed since then.

27. The respondent has, however, brought together an array of other evidence which he says supports his contention that he is at real risk of being subjected to such inhuman and degrading treatment. In particular, he has relied upon the European Committee for the Prevention of Torture ("CPT") reports of 2009 and 2013 in relation to Poland. He has relied upon the evidence of the lawyer Ms. Dabrowska, who has referred to a letter from the Human Rights Defenders in Poland to the Minister of Justice in Poland dated 24th May, 2016, a letter to which I will return. Ms. Dabrowska gives statistics from the central prison administration regarding suicide attempts and deaths in custody. She has

mainly complained, however, of the Polish system of medical care in custody. She relied upon a report from the Helsinki Foundation for Human Rights in Poland which is the leading Polish human rights NGO who conducted a project "Prison *Health Services in Poland - Aspirations to Realise the Human Rights*" which started in 2010 and issued reports in January, 2013.

28. Ms. Dabrowska says that the report showed that medical staff was insufficient in the prisons. There was also insufficient medical experts within the prison system. It was said that the infrastructure was obsolete and not all hospitals and dispensaries fulfil conditions set out in the regulations of the Ministry of Health Services. There was a lack of funds for spending on health care and that there was a delay usually in the taking of decisions concerning arrested persons in particular. Finally, there was lack of focus by prison staff towards prisoners as patients rather than simply prisoners. She said that the report shows the prison health system needs fundamental changes.

29. The main evidence relied upon by the respondent was the letter of Adam Bodnar, whose title was translated as Citizen Rights Ombudsman, but who has alternatively been called the Commissioner for Civil Rights Protection or the Commissioner for Human Rights, and the head of the Human Rights Defenders of Poland. While there may be some confusion as to his correct title and how it has been translated, it appears not to be contested, and indeed the Court accepts, that he is head of the organisation which the Polish government has nominated as the National Preventive Mechanism under the Optional Protocol to the Convention against Torture ("OPCAT"). The Convention against Torture is the U.N. Convention which prohibits torture and inhuman and degrading treatment. This Court considers that a National Preventive Mechanism has a role to play in the context of information to which an executing judicial authority of an EAW may have regard when assessing whether there has been a violation of Article 3 of the European Convention on Human Rights.

30. It is important, therefore, to analyse carefully what Mr. Bodnar is saying. In his letter addressed to the Minister for Justice in Poland, he is asking the Minister to take a legislative initiative in the direction of change in applicable law that will guarantee to prisoners a minimum of 4m² of living space for each prisoner in a shared cell. He says that the existing 3m² standard in Poland is inconsistent with the minimum standard with which Poland has undertaken to comply. He refers to the difficulties with staffing in prisons in Poland and the infrastructure of the penitentiary units that cause a large amount of inmates to stay in cells 23 hours a day in conditions that ensure the minimum living space of 3m². Mr. Bodnar says it calls for urgent change.

31. In Mr. Bodnar's view, the direction that the proposed legislative change must take is due to the international commitments made by Poland, the recommendation of the European CPT, the recommendations of the U.N. Committee against Torture ("CAT") as well as the case law of the European Court of Human Rights ("ECtHR") in Strasbourg. He points to 4m² being a common standard among other European countries.

32. Mr. Bodnar states:-

> "[…] [t]he national legal order in terms of standards of living space per prisoner, raises my doubts with respect to the basic standards of human rights and adopted by the Republic of Poland international obligations, in particular those relating to the above mentioned prohibition. These doubts are confirmed by the CPT reports from periodic visits in Poland and recommendations addressed to the Polish authorities, in whom repeatedly emphasises the need to respect the standard of 4m² per person."

33. He refers to the CPT standards issued on 15th December, 2015 in a document entitled *"Living Space Per Prisoner in Prison Establishments: CPT Standards".* These

standards are 6m² of living space for a single occupancy cell plus sanitary facility and 4m² of living space per prisoner in a multiple occupancy cell plus fully partitioned sanitary facility.

34. As well as referring to the general law in Poland permitting prisoners to be held in 3m² of space, Mr. Bodnar pointed out that Polish law provides for persons to be kept in less than 3m² in certain circumstances. It appears that certain persons can be kept for limited periods of time, *i.e.* 14 days with a court permitted extension to 28 days. This applies in only certain circumstances, *i.e.* those sentenced to imprisonment exceeding two years, those who have voluntarily freed themselves from serving a sentence of imprisonment, convicts who did not return from temporary leave, those transported by order of court or prosecutor from another prisoner detention centre in order to participate in the hearing process or other activities and detainees punished with a fine or with other measures of coercion in place resulting in the deprivation of freedom.

35. Mr. Bodnar pointed out that the Constitutional Court in Poland stressed that everyone deprived of liberty should be treated in a humane manner. It appears that the Constitutional Court pointed out that Poland, as a member of the United Nations and the Council of Europe, should respect the standards set out in the relevant international human rights treaties. Mr. Bodnar also pointed to the cases of *Orchowski v. Poland* (App. No. 17885/04) and *Sikorski v. Poland* (App. No. 17599/05), judgments of the European Court of Human Rights dated 22nd October, 2009 in which violations of Article 3 had been found.

36. In his letter, Mr. Bodnar draws the attention of the Minister for Justice to the decision of the Court of Justice of the European Union ("CJEU") in the joined cases of *Aranyosi and Caldararu* (C-404/15 and C-659/15 PPU) of 5th April, 2016, in which the CJEU rules that it should postpone the execution of an EAW in the event of the occurrence of a real risk of inhuman and degrading treatment under the provisions relating to the person concerned as regards conditions of detention in the issuing member state. If the risk cannot be ruled out within a reasonable time, the executing judicial authority should decide whether to discontinue the execution of the surrender proceedings. He gives his opinion that the facts could lead to a finding that Poland is in breach of a prohibition on torture and inhuman and degrading treatment and may result in the postponement of EAW applications or outright cancellation of them.

37. Mr. Bodnar also points to modern penological research about isolation in prisons. However, he also points to a piece of research by a Dr. Aldona Nawoj-Sleszynski who deals with issues of "proxemics". This is apparently the study of the space that people feel necessary to set between themselves. In this doctor's view, the standard should amount to between 4m² and 5m² of living space. Mr. Bodnar refers to the negative psychological effects of staying in overcrowded conditions which he says may lead to sensory overload (lack of possibilities to process information and stimuli that flow from the environment), so-called "behavioural swamp" whose manifestation is an increase in aggressiveness, and negative emotional states of higher levels of physiological arousal. It has been reported that conditions of high density induces states of helplessness. He also refers to the fact that persistent overcrowding may lead to the growth of various epidemics including infectious diseases.

38. In Mr. Bodnar's view, he sees a deep need to amend existing laws regarding the minimum living space per prisoner in a penitentiary unit. It is his view that embedding prisoners in conditions of 3m² and, in some cases, less, would be a violation of the ECHR and could result in legal liability before the European Court of Human Rights.

39. The respondent also relied upon a late affidavit that was filed by a solicitor/advocate from the Warsaw Circuit Advocate Bar Council, Ms. Malgorzata Fil, who specialises in cases concerning compensation for unjustified detention and sentencing. Ms. Fil refers

at first to a person who is being detained, for which an application for detention or order to serve a sentence has been made, and is conveyed to a police detention. She says that from her knowledge, the detention can last "even a whole day" while the detainee is not provided with food or drink. She says this is usually in less than 3m² and the person is under constant surveillance. There is usually no bed or bunk but only a stone bench where at night a mattress and blanket is placed but a cell light is on for 24 hours. These cells may have little sanitation available and people have to wait.

40. Ms. Fil also refers to a situation where, contrary to Polish regulation, prisoners in detention in prison may not get consent to the delivery of clothing from outside the prison for a long time. She says this can be particularly humiliating where people have to wash out their clothes in a cell.

41. She then refers to the fact that Article 110 of the Criminal Executive Code permits detention in a residential cell for a convicted person of not less than 3m². She also refers to the provisions where a person may be permitted to be in a cell of less than 3m². This, it is noted, refers to a person convicted.

42. Ms. Fil states reports from her clients show that, although the above regulation should have an absolutely unique character in practice, prisoners reside in such conditions much more often. She says the situation occurs especially in Warsaw's penitentiaries where an enormous number of prisoners are present. She says that in the case of extradition on the basis of an EAW, the person detained in the first place usually has already being taken at the Warsaw penitentiary.

43. She also refers to the fact that showers only take place once a week and that one of her clients got sick with skin disease which she says was due to lack of basic hygiene. In her view, "[…] the intensity of stressors, due to, among other conditions in the Polish penitentiary institutions, causes that the incarcerated people begin complaints of psychological disorders, *i.e.* insomnia, neurosis and nightmares. People, while in prison often also the (sic) anxiety caused by the sudden incarceration in the penitentiary conditions and isolation from loved ones people". She is of the view that immediate undertaking of initiatives is required.

Submissions

44. Counsel for the respondent also relied upon the decision of the ECtHR in the case of *Mursic v. Croatia* (App. No. 7334/13, 20th October 2016). Counsel relied in particular upon the following paragraphs:-

> *"136. In the light of considerations set out above, the Court confirms the standard predominant in its case-law of 3 sq. m. of floor surface per detainee in multi-occupancy accommodation as the relevant minimum standard under Article 3 of the Convention.*
>
> *137. Where the personal space available to a detainee falls below 3 sq. m. of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 arises. The burden of proof is on the respondent Government which could, however, rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space (see paras. 126 to 128 above).*
>
> *138. The strong presumption of a violation of Article 3 will normally be capable of being rebutted only if the following factors are cumulatively*

met:

> *(1) the reductions in the required minimum personal space of 3 sq. m. are short, occasional and minor (see paragraph 130 above):*
>
> *(2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities (see paragraph 133 above);*
>
> *(3) the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention (see paragraph 134 above).”*

45. The ECtHR at para. 130, referred to short, occasional and minor reductions in the required personal space in other cases which rebutted the strong presumption of a violation of Article 3. The ECtHR referred to cases where people were held in conditions of less than 3m² for periods of time of up to 19 days, 10 days and 26 days. In those circumstances, no violation of Article 3 was found. It is also noteworthy, however, that the ECtHR went on to say at para. 139 that:-

> *“In cases where prison a cell - measuring in the range of 3 to 4 sq. m of personal space per inmate - is at issue the space factor remains a weighty factor in the Court’s assessment of the adequacy of conditions of detention. In such instances a violation of Article 3 will be found if the space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements (see paragraph 106 above).”*

46. Counsel for the respondent also relied upon the case of *Aranyosi and Caldararu*. While counsel accepted that the case set out the steps that a court should take when considering whether a violation of Article 3 had occurred, counsel was of the view that the ECtHR had accepted that older CPT reports and ECHR cases could be of themselves sufficient to establish the existence of a systemic violation.

Decision and Analysis of the Court

47. At para. 89 of the *Aranyosi and Caldararu* judgment, it is stated:

> *“To that end, the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.”*

48. This Court is quite satisfied that the above passage demonstrates that there must be an examination of updated objective reliable and specific information on detention conditions. It is not sufficient to rely on older reports in the absence of a cause for concern that those reports are still relevant.

49. Of more fundamental importance is that it is not enough for the court to look at

whether there is a systemic or generalised deficiency in the country which affects certain groups or certain places of detention. Instead, under para. 92 of *Aranyosi and Caldararu*, the executing judicial authority must, where the risk has been identified, make a further assessment "*specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State."*

50. The requirement to consider whether the individual concerned will be exposed to the risk, had been established in this jurisdiction prior to the decision in *Aranyosi and Caldararu*. The decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3. I.R. 783 was a prescient and principled statement of the approach that the High Court must adopt in assessing these matters. A burden exists on a respondent to adduce evidence capable of proving that there are substantial grounds for believing that if *he* or *she* was returned to the requesting country, *he* or *she* would be exposed to a real risk of being subjected treatment contrary to Article 3 of the European Convention on Human Rights.

51. In this case, counsel for the respondent makes two separate arguments. The respondent's first argument is that the national standard in Poland of 3m² is inhuman and degrading, in particular when joined with the other conditions that prevail in Poland. Counsel's second argument is that the respondent is at risk of being held in conditions of less than 3m², which are of themselves inhuman and degrading.

52. The Court must look at whether there is objective, reliable, specific and properly updated information on the detention conditions which prevail. On the general issue of the national minimum of 3m² of living space, the only updated information has come from Mr. Bodnar who is the head of the National Preventive Mechanism under the Optional Protocol to the Convention against Torture. As stated above, this Court must have and does have regard to his views. However, his views in this case are literally just that: views. His letter is not a report on conditions in Poland's prisons; it is in essence a plea for Poland to change its national legislation to comply with minimum standards set by the European Committee for the Prevention of Torture.

53. The respondent has not submitted any report from the National Preventive Mechanism concerning prison conditions generally in Poland and indeed, the CPT reports that the National Preventive Mechanism had not assessed the conditions with the required frequency and comprehension. However, the Court is conscious that the CPT's criticism appeared to be directed towards the Polish authority as regards funding the National Preventive Mechanism. Therefore, the Court must be wary and is wary of inflicting an impossible burden of evidence gathering on respondents where that type of evidence cannot exist because of lack of funds. Commenting on the lack of a report from the National Preventive Mechanism is not a criticism of that body or of the respondent. The relevance is that it places in context the fact that the opinions of Mr. Bodnar appear not to be based upon additional factual information but on a review of information already in the public domain, including those from international bodies. Mr. Bodnar, in the letter, opines that if Poland does not amend its legislation, it may be found in breach of Article 3 of the European Convention on Human Rights.

54. An important point to note is that the CPT document of 15th December, 2015 setting standards for living space for prisoners, is itself very clear that there is a need to differentiate between minimum standards and inhuman and degrading treatment. Indeed, the title of a section of the document at p. 5 reads "*Minimum Standards v. Inhuman and Degrading Treatment - The Need To Differentiate*". It is expressly stated that the CPT has never considered that its cell size standard should be regarded as absolute, as other alleviating factors such as time outside cells must be considered when there are minor deviations from the minimum standards. The CPT has contrasted its role

with that of the ECtHR, the latter body being obliged to decide whether or not the holding of prisoners in cells offering a very limited living space per person (usually less than 4m²) constitutes a violation of Article 3 of the European Convention on Human Rights.

55. What is particularly striking about the ECtHR decisions, is that the ECtHR considers that 3m² is the relevant minimum standard for Article 3 of the European Convention on Human Rights. Therefore, the existence of legislation that provides for 3m² per prisoner does not of itself establish a systemic violation of the European Convention on Human Rights.

56. It is also noteworthy that Mr. Bodnar does not state that all prisoners are held in conditions of 3m² nor indeed can that be gleaned from the CPT report dated June 2014 and this is relevant as to how this Court must assess the information received from the issuing state in this particular case as to the detention of this respondent. The Court also notes, however, that the report of the CPT, dated June 2014 concerning the visit in 2013, stated that they had been informed that almost 1,000 new prison places were to be created in the course of 2013 and that the Electronic Surveillance Act had become fully operational and was being applied to 5,500 prisoners in 2013. Further places were due to come on stream in 2015. None of those specific issues are addressed in either the letter of Mr. Bodnar or the specific information contained in the affidavits of Ms. Dabrowska and Ms. Fil.

57. This Court gave an *ex tempore* decision in the case of *Minister for Justice and Equality v. Strzelecki* (unreported, *ex tempore*, Donnelly J.,15th October, 2015), a case briefly mentioned in the course of oral submissions in the present case. In that case, concerning consent to further prosecution under s. 22 of the Act of 2003, the Court considered issues of cell size and other complaints about conditions in Poland but was not satisfied that the conditions that that respondent was being held in, who was then present in prison in Poland, amounted to inhuman and degrading treatment. The Court does not consider that any new information has been provided which would require the High Court to reach a different conclusion to that reached in that decision. It is also noteworthy that in the case of *Minister for Justice, Equality and Law Reform v. Machaczka* [2012] IEHC 434, the High Court rejected the proposition that the medical conditions in the Polish prisons in which a mentally ill respondent would be held would amounted to substantial grounds for believing that there was a real risk of that respondent being subjected to inhuman and degrading treatment. In this case, the respondent has not complained of any medical condition which requires attention. In particular, even though Ms. Dabrowska has referred to the Helsinki Foundation for Human Rights in Poland Report of 2013, the information is not so different from that which was considered in *Machaczka*. Its relevance is directed towards overcrowding in the prisons rather than specific medical concerns as regard this respondent. The Court does not consider that the information provided by Ms. Dabrowska is sufficient to raise any particular concerns about inhuman and degrading treatment that has not been considered by the High Court previously.

58. Moreover, without having to make a determination as to whether the new information is capable of supporting a conclusion that there is a systemic deficiency in the conditions of detention to raise concerns about treatment that may not be in compliance with Article 3, the Court is entitled to assess whether there are substantial grounds for believing that this individual respondent is at real risk of being exposed to those conditions which he asserts would amount to a breach of Article 3 rights. In this regard, it is important that the Court is mindful of difficulties of proof that a respondent may have as regards what prison he will be attending, or indeed otherwise obtaining up to date proof beyond those available in the most recent reports or decisions of international adjudication tribunals. In this case, however, the issuing judicial authority

has given further information which must be taken into account.

59. The information is that on return to Poland, the respondent will be held in Warsaw-Bialoleka. From there, he will be transferred to the detention ward in Bialystok "due to the competence of the Public Prosecutor's Office in which the proceedings against the suspect are being conducted."

60. The respondent has placed particular weight upon the evidence of Ms. Fil who gives specific evidence about the state of Warsaw penitentiaries. In the view of this Court, the information from the Polish authorities is clear - his detention is Warsaw is temporary as he is going to be transferred to Bialystok. Indeed, it is implicit within Ms. Fil's evidence that, apart from the issue of being detained in cells less than 3m², to which I will return, her complaints primarily relate to those being held in police detention or on early transfer to prisons.

61. While it is unsatisfactory and entirely inappropriate that detainees would not have early access to fresh clothes on initial detention, there is a minimum threshold for treatment before it must reach a level which is contrary to Article 3 of the European Convention on Human Rights. It is also noted that such treatment is against Polish law. Similarly, while deeply concerning, the Court cannot regard evidence that, on occasions, certain prisoners who, on initial detention or who are on transfer, have been deprived of food or drink for periods lasting less than a day reaches the minimum threshold of conditions which would amount to inhuman and degrading treatment. This should not occur to any prisoner and is also, in all likelihood, a breach of prison rules in Poland as it would be here. However, in light of the jurisprudence of the ECtHR, the Court is not satisfied that even if such a situation would occur, it would amount to a breach of Article 3 of the European Convention on Human Rights. Therefore, as regards his temporary detention in Warsaw and subject to further consideration of the issue of being held in a cell of less than 3m², no real risk of a prospective breach of the respondent's Article 3 rights has been established.

62. It is of importance that, as well as stating that all penitentiary units observe European norms, the authorities in Poland also said that this respondent will be transferred to the detention ward in Bialystok. There is specific evidence from the issuing state that this unit has been regularly inspected including by staff of the Prison Service of Norway. It is reported that the Norwegian prison staff did not have any concerns regarding the conditions of this institution but were greatly satisfied with them. The respondent has submitted that that Court should not put any great weight on that information as it is from a prosecution source. The Court rejects that submission and affirms that the principle of mutual confidence extends to institutions of the member states, in particular those concerned in the field of criminal justice, such as prosecuting authorities and indeed prison authorities.

63. It is of relevance that the respondent has not engaged in any way with the particular detention centre in which it is indicated he will be detained. His evidence about prison conditions has been put forward at a level of generality. His expert evidence was not made specific to him or to his situation or to the detention centre in which it has been indicated he will be held. This is particularly striking in that that the respondent has engaged the services of not one, but two, criminal lawyers in Poland to assist him in resisting his surrender on this very ground. Neither lawyer addresses the evidence presented by the issuing state, which is particularly telling in the case of the affidavit of the second lawyer, Ms. Fil, as her affidavit post-dates the information from the issuing state concerning his detention in Bialystok. The first lawyer, Ms. Dabrowska, had been specifically asked to address the particular detention unit in which he would be incarcerated and she stated that she could not say. She was not thereafter asked to address the conditions in Bialystok, when the evidence revealed that he would be

incarcerated there. Furthermore, the letter from the head of the Polish National Preventive Mechanism is addressed to the reconsideration of the legal standard at issue in Poland and does not address specific prisons or indeed the numbers of prisoners in Poland who are being kept in these conditions.

64. In all those circumstances, the Court is not satisfied that the respondent has established by evidence that there are substantial grounds for believing that *he* is at real risk of being held in conditions which would amount to a violation of Article 3 of the ECHR by virtue of his detention in Bialystok and by reference to the provision in Polish law that provides for a minimum standard of 3m² of living space as well as other conditions in Poland. It is unnecessary for the Court to pronounce specifically on whether there are systemic or generalised deficiencies in Polish prisons by virtue of the evidence produced because, despite the uncontested evidence from the issuing state that the penitentiary unit in which he will be detained when he is transferred is in conformity with European norms and has been deemed satisfactory by Norwegian prison staff, the respondent has not engaged with this at all. The Court does observe that having a national standard of 3m² does not of itself establish that surrender to Poland would amount to a breach of Article 3, but in cases of detention in living space of between 3m² and 4m², it is a weighty factor in the consideration of all the other conditions of detention. There is no evidence that the respondent is at real risk of being exposed to such conditions that when taken together would amount to ill-treatment contrary to Article 3.

65. As regards the statement in Mr. Bodnar's letter about "proxemics", the Court cannot give any real weight to such expert evidence presented in a third hand manner. If evidence of that nature is to be relied upon to reset standards, beyond what the ECtHR considers minimum for Article 3 purposes and even beyond what the CPT considers at a minimum, it would have to be presented in a manner which permits the Court to assess the expert as well as the basis for his assertions.

66. Dealing with the issue of the risk of being held in less than 3m², the Court finds that this evidence is also at a level of unreality. There are provisions in Poland which permit this to occur. Those provisions relate to those convicted, e.g. reference to Article 110, subs. 2(b) "director of the prison or detention centre may place convict…"; therefore, as the respondent will not be a convict in Warsaw but instead will be a prisoner in transit, those particular provisions do not apply to him.

67. Insofar as it may be said that these could apply to him in the future as he may be subjected to a sentence of imprisonment of more than two years, the respondent has not addressed the situation in Bialystok. This is the prison to which he would be sent. As referred to above, he had the opportunity and the available expertise to address the conditions therein and the reply of the issuing state but he did not do so.

68. Much more importantly, however, is that the respondent has failed to have regard to what is stated quite clearly in the *Mursic v. Croatia* judgment on which he himself has relied. From the passage in the judgment referred to above, there are occasions when reductions in required minimum personal space of 3m² may not violate Article 3 of the European Convention on Human Rights. These are in short, occasional and minor circumstances when accompanied by sufficient freedom of movement outside the cell and adequate out of cell activities. The respondent has not shown that those occasions when this is utilised are not accompanied by such out of cell movement or activities; Ms. Fil's affidavit is silent in that regard and does not address the legal basis for a finding that this type of short term detention would amount to a violation of Article 3.

69. Furthermore, Polish legislation recognises that detention of this type should be of limited duration; up to 14 days after which it can only be extended by a judge up to a

maximum of 28 days. If they are to go beyond 14 days or have been used on a regular basis against a particular individual, an inmate will have an opportunity to have his case assessed by a judge who, it must be presumed under the provisions of s. 4A of the Act of 2003, will be conscious of and adhere to the fundamental rights provisions of the ECHR and Article 3 thereof in particular. This Court must presume that a judge in Poland will not permit a person to be kept in detention with living space of less than 3m² for a period such as the 27 day period as found by the ECtHR in *Mursic* to be a violation of Article 3, despite Polish law permitting a judge to extend the detention to a maximum of 28 days. If there was evidence that extended detention of this type was occurring in Poland despite the decision in *Mursic*, then a different approach by the High Court to surrender applications would have to be taken.

70. Therefore, this Court considers that the evidence does not establish that there is a real risk of this particular respondent being subjected to treatment that would be inhuman and degrading by virtue of the prison conditions in Poland. His point of objection is therefore rejected and the Court finds that his surrender is not prohibited under s. 37 of the Act of 2003.

Section 37 of the Act of 2003: Article 8 of the European Convention on Human Rights

71. These alleged offences occurred in 2004 and 2005. It appears that the respondent left Poland in May 2005 to go to London for work. In or about Christmas 2006, he moved to Dublin. He appears to have had a work history for most of this time although he has been unemployed for the last twelve years. He is now divorced with two adult children. He has little contact with his ex-wife. His two adult children live in Poland. His daughter lived with him for about three years between 2010 and 2013; she has since returned to Poland where she now lives with his ex-wife.

72. He says that he is settled here and has now nothing to return to in Poland. The Court has also been informed that at this point in time, he has pleaded guilty and is in custody awaiting sentence in respect of an offence contrary to s. 15 of the Misuse of Drugs Act, 1977, as amended.

73. Counsel for the respondent expended considerable effort in seeking to compare favourably the delays in this case with the delays in the case of *Minister for Justice and Equality v. Ciecko* (Unreported, *ex tempore*, Edwards J., 18th December, 2013). In that case, a sentence had been imposed for three offences which were in the nature of theft or criminal damage offences. There had been delays which the High Court felt were unexplained. That respondent also had established his life in Ireland and in particular had a young child in Ireland who was in school here. The court in that case held that the delay significantly diluted the pressing social need for his extradition and, in light of his particular circumstances, held that to surrender him would violate his Article 8 rights.

74. The principles on which this Court should assess Article 8 claims have been identified by the High Court in *Minister for Justice and Equality v. P.G*. [2013] IEHC 54 and *Minister for Justice and Equality v. T.E.* [2013] IEHC 323. Those principles have been applied repeatedly by the High Court since then. As this Court has stated on other occasions, simply to compare the facts of one case with the facts of another case would be a failure to engage with the tests set out in P.G. - those tests require an individual assessment of the public interest features in the case, as well as of the family and personal circumstances.

75. Furthermore, the Supreme Court (O'Donnell J.) in *Minister for Justice and Equality v. J.A.T*. (No.2) [2016] IESC 17 in dealing with Article 8, stated at para. 10-11 as follows;

> *"These factors - repeat application, lapse of time, delay, impact on the appellant's son, and knowledge on the part of the requesting and executing authorities of those factors - when weighed cumulatively, are powerful. Even then, and without undervaluing the offences alleged here, it is open to doubt that these matters would be sufficient to prevent surrender for very serious crimes of violence. This illustrates that the decision in this case is exceptional, and even then close to the margin.*
>
> *In any future case, where all or any of the above factors may be relied on, it would not, in my view, be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously."*

76. It can be seen, therefore, that the references to delay do not warrant any great scrutiny in this case. This is a man who left Poland, as it appears he was entitled to do, shortly after these alleged offences. He was under no obligation to remain, but it is clear that he went to two separate European member states after he left Poland. A warrant was issued for his arrest in 2011 and as soon as he was located in Ireland, steps were put in train to issue the EAW and to transmit it to Ireland. More particularly, however, these are allegations of serious crimes of personal violence. Even if there was some culpable delay on either the part of the Polish or indeed the Irish authorities in effecting his arrest, the pressing social need for his extradition would not be significantly diluted.

77. Furthermore, on his private rights side, he has put almost nothing in the balance, apart from saying that he had been in this country for almost 10 years until the date of his arrest and that his life is now based here. Being taken from one's place of residence is an unfortunate, inevitable consequence of extradition. In all of the circumstances set out, but especially in light of the allegations of serious crimes of violence against this respondent, this case does not come close to one in which the threshold for refusal to surrender would have been reached. Surrender in this case is not a disproportionate interference with his private rights. In those circumstances, this point of objection is rejected and the respondent's surrender is not prohibited by Article 8 of the European Convention on Human Rights.

Conclusion

78. For the reasons set out above, the Court rejects the points of objection advanced by the respondent in this case. Therefore, the Court may make an order for the surrender of this respondent to such other person as is duly authorised by Poland to receive him.